

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CARDINAL HOME PRODUCTS, INC.

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC

Cases 6-CA-31665
6-CA-31720
6-CA-31810
6-CA-31848 and
6-CA-32053

CARDINAL HOME PRODUCTS, INC.

Employer

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC

Case 6-RC-11868

Petitioner

Kim Siegert, Esq., and Julie Stern, Esq.,
for the General Counsel.

Mary G. Balasz, Esq., of Cleveland, Ohio,
and *Kerry P. Hastings, Esq.,* of
Cincinnati, Ohio (both of *Taft, Stettinius*
& Hollister, LLP), for Respondent-Employer.

Richard Brean, Esq., and Theresa Merrill, Esq.,
of Pittsburgh, Pennsylvania, for the Charging
Party-Petitioner.

DECISION

Findings of Fact and Conclusions of Law

Benjamin Schlesinger, Administrative Law Judge. This consolidated unfair labor practice proceeding involves numerous alleged violations of the Act, including a discharge and the failure to recall three employees from layoff, so severe, the complaint alleges, that a bargaining order under the authority of *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 584 (1969), is warranted. That would negate the results of the election that was conducted in Case 6-RC-11868 on October 13, 2000,¹ which Charging Party United Steelworkers of America, AFL-CIO, CLC (Union) lost, 29-16, with 6 challenged ballots. Respondent Cardinal Home Products, Inc.,

¹ All dates are in 2000, unless otherwise indicated.

denies that it violated the Act in any respect or that it committed any objectionable conduct which would warrant the setting aside of the Board-conducted election.²

Respondent, an Ohio corporation with an office and place of business in Linesville, Pennsylvania, is engaged in the manufacture and non-retail sale of outdoor lawn and patio furniture and picnic tables and structural jack posts and columns for the building industry. During the year ended September 30, Respondent sold and shipped from its Linesville facility goods valued in excess of \$50,000 directly to, and purchased and received at its facility goods valued in excess of \$50,000 directly from, points outside Pennsylvania. I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent has two production lines, the black line, which manufactures the lawn furniture, and the red line, which manufactures the jacks and columns. The red line operates all year round, but the black line is more seasonal, the busy season running from October or November and ending in May, sometimes later. Respondent employs not only what it calls its permanent employees but also, particularly during the busy season, a substantial number of temporary employees. Sometimes, Respondent employs no temporaries; other times, 40 or 50. Temporary employees sign a statement acknowledging that their job is temporary. When Respondent has no need for temporary employees, they are laid off, sometimes without being recalled. They are always laid off before permanent employees, who are rarely laid off. Permanent employees receive the following benefits that temporary employees do not: an annual shoe allowance of \$40, and paid hospitalization, dental, disability, and retirement plans. The temporary employees' benefits are minimal: paid holidays after two years and a paid vacation after three.

A number of employees, particularly Howard Simmerman, became interested in seeking the help of a union. Many believed that they had not received a raise for a number of years (they had received bonuses), and Respondent's President, Ron Noll, at his annual visit from corporate headquarters in Solon, Ohio, had just announced at a July meeting a 25-cent raise which the employees apparently thought was inadequate. Another employee, Bonnie McGill, whose discharge is a subject of the complaint, gave Simmerman the telephone number of the Union. On Saturday, July 29, a first meeting was held at Simmerman's house with Pete Passarelli, the Union's organizing coordinator for Pennsylvania, and employees Wayne Slee, Sam Thomas, Shawn Dyne, Charles Alderman, John Wheeler, and Steve Allen. Passarelli discussed how to organize and particularly how to get authorization cards signed. He told the employees to have the potential signers read the card. He instructed the employees to tell others that they should sign the cards only if they wanted to be represented by the Union and not to get an election or because they were friends. In other words, employees were not to sign cards if they were not interested in being represented by the Union.

The employees who attended the meeting seemed generally to have followed Passarelli's advice by limiting what they told their fellow employees. Equally important, it seems that the other employees were, at least initially, as enthusiastic as the employee organizers,

² The charge in Case 6-CA-31665 was filed on October 17 and amended on December 21, 2000. The charges in Cases 6-CA-31720, 6-CA-31810, 6-CA-31848, and 6-CA-32053 were filed on November 14, 2000, January 5 and 22 and May 2, 2001, respectively, and the second amended consolidated complaint was issued on July 18, 2001. The hearing was held in Meadville and Linesville, Pennsylvania, on July 30 to August 1 and August 21-23, 2001.

with as many as 47 signing cards, mostly on Monday, July 31, and some others the following day. According to Simmerman, the employees were so eager to sign that they were literally ripping the cards from the hands of those who were trying to get signatures and complaining that they had not been asked first. He testified that he could not give them out quickly enough. With that number of cards turned over to the Union, it filed a petition with the Regional Office on Wednesday, August 2. The Union wrote on the petition that it served as a demand for recognition.³

There followed a representation hearing, held on August 16 and 23, at which Simmerman and Christine Larson, a temporary employee who had been laid off recently, testified on behalf of the Union, in support of the contention that temporary employees should be included in the appropriate unit. Another temporary employee on layoff, Sam Thomas, had been subpoenaed to testify for the Union, but did not. He did, however, attend the hearing, sitting with Larson. Respondent's legal position in the representation case was that the temporary employees should not be entitled to vote. The Regional Director issued his Decision and Direction of Election on September 15, generally sustaining the Union's position that temporary employees should be included in the unit.

The Union announced that Decision in a flyer distributed on about September 18, celebrating "OUR FIRST VICTORY." It featured prominently a photograph of Union supporters, among them Simmerman, Larson, Thomas, Slee, Steve Weikal, Bill Richards, and Ernest Banks, another employee who was on layoff at the time of the hearing. The complaint alleges that Respondent violated the Act by not recalling Larson, Thomas, and Banks, and that Simmerman and Richards were otherwise discriminated against. Respondent's supervisors and management were familiar with the flyer, and I find that Respondent was well aware of these employees' leanings toward the Union, as well as the leanings of the others in the photograph: Alderman, Wheeler, Allen, Dyne, Tony Morabito, Ray Black, Rick Chizmar, and Don Abrams.

The facts in this proceeding were hotly contested. Almost without exception, all the allegations were denied. Witnesses viewed the same incidents from utterly different perspectives. I have recited the facts which, after most careful consideration and deliberation, I find accurate. In making these and other credibility findings, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses, the inherent probabilities in light of other events, corroboration or the lack of it, and the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony inconsistent with or in contradiction to that upon which my factual findings are based has been carefully considered but discredited. See, generally, *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

I have particularly considered the testimony of Simmerman, who not only has in the past made up two curious tall tales but also in this proceeding changed his testimony from the first day to the second with utter abandon. I have not credited some of his uncorroborated testimony. Other witnesses called by the General Counsel also testified at variance with their investigatory affidavits, and I have considered that, but note that most of the variances were insignificant and often the result of their failed attempts to read the poor handwriting of the Region's investigator. I have considered Respondent's failure to call Noll as a witness. He played a major role in a number of the alleged unfair labor practices, and his absence was totally unexplained.

³ In addition, on January 4, 2001, the Union wrote a letter requesting recognition, which Respondent declined.

International Automated Machines, 285 NLRB 1122 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988). I have also considered the absence of one of Respondent's supervisors, whose testimony might have been enlightening and made some difference in the results reached. Where necessary, I have set forth the precise reasons for my credibility resolutions, bearing in mind the oft-quoted advice: "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

Because some of the credibility issues are so difficult, I deal with a few unfair labor practice allegations out of order. My resolution of them is at least helpful in explaining how I reached some of my credibility findings. One of the principal alleged violations on which the Union relies to support its claim that a bargaining order is warranted is that, on about September 25, at the same time that Respondent was recalling employees for the second shift, as we shall see below, Respondent promoted five employees, Douglas Bilich, Robert Clark, Arthur Miller, Jeremy Peterson, and Weikal, from temporary to permanent positions. The General Counsel contends that Respondent did this to convince these employees to vote against the Union in the election, which was scheduled just two and one-half weeks later, to remind its employees of its power, and to sway the votes of its employees by providing benefits.

There was no showing that Respondent intentionally targeted Union supporters or opponents for promotions. It knew only of the sympathies of Weikal, whose photograph appeared on the Union leaflet. Although Miller and Peterson signed union authorization cards, the General Counsel did not prove that Respondent knew that they signed cards. Bilich and Clark did not sign cards, and Respondent did not know that, either. Indeed, Bilich opposed the Union. In sum, nothing can be gleaned from Respondent's selection of the employees whom it promoted. They represented both Union proponents and opponents.

By granting benefits before the election, an employer certainly takes some risks of being accused of doing so for unlawful purposes. No doubt, the action might change votes. But, here, Keil testified that Respondent had a practice of trying to keep about 40 permanent employees and that, when it employed less than 40, it generally promoted a number of temporary employees to permanent positions so that it would reach that number. Cardinal's roster of permanent employees had declined from 44 in January to 35 in September. The 5 promotions then brought the permanent roster back to 40.

Because Respondent appeared to maintain at least a practice of promoting employees to permanent status, the General Counsel now contends that the timing of the promotion was what made it illegal. That contention was aided by plant manager Robert Keil, who testified that, in the July meeting which prompted the Union organizing drive, Simmerman complained to Noll that Respondent employed too few permanent employees and too many temporary employees; and he was concerned that the temporary employees were going to replace the permanent employees. Noll responded that he would address that issue. Simmerman's complaint predated the Union campaign; and, at the hearing, Keil was asked why he did not remedy the complaint when the issue was first raised. Keil answered:

Because of the reasons I mentioned before. That's not the period of time we look at that. We did however, talk about some people for when the event would develop, and when we would make these people permanent.

Keil testified that the promotions occurred “almost always in the fall.” They were timed to allow

us time to look at the last previous two quarters, see where we’re at. It’s the low point in our business, volume of business; volume is very low about that point because we basically have no Black Line activities. And we assess our insurance costs and everything at that time. But that is the time we determine, based also on the projected sales for the following season, what we’re going to need.

The problem with his explanation is that of 16 employees whom Respondent promoted since 1993, only one was promoted in the fall. Of the others who were promoted, 1 was promoted in March, 2 in June, 3 in early July, 3 in late July, and 6 in early August. Keil’s explanation did not approach the truth.

An employer violates Section 8(a)(1) when, during a Union organizing campaign, it grants pay increases or other benefit improvements “for the purpose of inducing employees to vote against the union” or is reasonably calculated to impinge on employees’ freedom of choice for or against unionization, *NLRB v. Exchange Parts Co.*, 375 U.S. at 409, or “with an eye toward achieving union disaffection.” *Acme Bus Corp.*, 320 NLRB 458 (1995). The Board makes no presumption that increases granted during an organizing campaign are unlawful, but it will draw an inference of improper motivation and interference with employee free choice from all the evidence and Respondent’s failure to establish a legitimate reason for the timing of the increases. *Speco Corp.*, 298 NLRB 439, 439 fn. 2 (1990), especially when it has ignored employee complaints prior to learning of the organizing efforts. *Pembroke Management*, 296 NLRB 1226 (1989).

Although there was a prior practice of promoting temporary employees to permanent employees, undoubtedly to a number higher than 40, because Respondent started the year with 44 permanent employees, Respondent gave no thought to continuing that practice until the issue was first raised by Simmerman, followed shortly after by the employees’ attempt to organize. It must be remembered that the decision to make employees permanent is a decision that costs Respondent money, because it is then obliged to grant various benefits that it did not have to provide to its temporary employees. Respondent obviously decided that it would not promote employees as it had in the past, in July or as late as early August. Keil’s reason for the delay of these promotions to shortly before the election was blatantly false, and Noll’s failure to testify—he was the one who answered Simmerman that he would look into his complaint—contributes to the failure of Respondent to explain the timing.

Alternatively, Respondent relies on its receipt of a series of new purchase orders from customers in September, but two of those were due for completion on September 24 and 26, the day before and the day after Respondent promoted the employees. The work, or at least the vast majority of it, had already been completed before the date of the promotions. The remaining order was received in October. In order to make the best of that, Respondent’s counsel, through suggestive questions, led Keil to testify that he would have known even before the receipt of a purchase order that someone was going to order something; and that notice, although Keil admitted not being “the authority on that,” could have been as much as a month or two before. Of course, if notice had been received on the first two orders long in advance, Respondent, under this theory, would have made its promotions in July, as it normally did, before any Union cards were signed, which it did not do. I find that Respondent has failed to

explain credibly⁴ the timing of these promotions. Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act.⁵

My assessment of Keil's credibility impacts on Respondent's failure to recall Larson. On August 8, Respondent laid off 11 temporary employees, including three known Union supporters, Larson, Thomas, and Banks. The complaint alleges that Respondent never recalled those three to work in retaliation for their union activities in violation of Section 8(a)(3) of the Act and, in the cases of Larson and Thomas, because they testified (Larson) or appeared (Thomas) at the representation hearing. (Two other Union supporters, Alderman and Wheeler, were present at the hearing, but were not disciplined and are not the subject of any of the complaint's allegations.) Larson, who was very active in the organizing campaign as a member of the Union organizing committee, applied for a job on October 19, 1998. Keil interviewed her, and she told him that she was a single mother and would work only on first shift. Keil made a specific note of that on her application form and hired her for the first shift, on which she worked continuously from October 1998 until May 12, 2000, when she was laid off. She was recalled on July 31 to the first shift, only to be laid off eight days later. Her supervisor, general manager Paul Ball, told her that Respondent had lost a couple of accounts and was not going to need as many people as it had thought. He could not predict when she would be recalled.

At the end of September, she met John Martell, who used to be her departmental red line supervisor. He told her to speak with Keil, because she was going to get her job back. So Larson went to the plant and spoke with Keil, who said, according to her, that Respondent did not have any opening on the first shift at that time; but, if she were desperate, he had second shift work available. Larson said that she still could not do second shift because her son was in school during the day, he would be at home at night, and she could not get child care for him. Keil asked about her efforts to get a job with another employer, and she replied that she had to turn down the offer because it was for second and third shifts. Larson asked about her old job in stain booth, and he said that that job "probably wouldn't be fired up till October, some time. He didn't know when. But, he'd get a hold of me." As Keil finished the conversation, he noticed Larson looking at a pile of papers on his desk, prominent among which was the Union flyer with her picture on it. Keil asked Larson whether she had seen that, and she said that she had and that she was surprised that Respondent had even wanted her to come back to work, because she had been so vocal about the Union. She said that the situation should not have come down to the organizational campaign, to which Keil replied: "Yeah, careful what you ask for, you just might get it." She again asked about when Keil would contact her, "towards the end of September?" and he said, "[H]e'd get a hold of me."

Keil's recollections were quite different. He testified that he had decided to recall Larson to the second shift in September, despite his misgivings about the truthfulness of her testimony at the representation hearing. He believed that, if he did not recall her, Respondent would face an unfair labor practice charge. He also testified, without explanation, that, if he did recall her, he would also face an unfair labor practice charge. And so, with misgivings, he telephoned her; but he was unsuccessful (her phone had been disconnected), and he was going to mail her a letter, when Martell told him that he had seen her at the post office. So he sent Martell to retrieve her and bring her to his office. Keil testified that he offered Larson a job on the second shift, but she declined because of her child care obligations. She asked about the stain booth,

⁴ It will be seen, below, that Respondent claims to have discharged McGill in early November because it had lost business, business was slow, and it was trying to save money.

⁵ The complaint alleges that the promotions also violate Section 8(a)(3), but the remedy for the Section 8(a)(1) violation alone is exactly the same.

and Keil said that he had no idea when Respondent was going to resume the operation. Otherwise, Keil testified that he never gave any indication that he intended to give Larson a second chance at employment and never made any promise to call her again.

After the October 13 election, Larson went to Jerry's Bar, where she saw supervisors Dan Webb and Leroy Davis. According to Larson, she asked why she had not been recalled, saying that she thought she was a good employee; and Webb replied that she and Thomas were on a list of people who were not to be recalled because they were "out to screw the company at all cost" through the Union. He added that the only reason Larson was for the Union was that Respondent had treated her badly. Webb suggested that if she had minded her own business and kept her mouth shut, she would have been recalled. She started to cry, insisting that she missed them and that they were like family. At some point, Webb said that he could make these comments because the election had concluded and he could no longer get in trouble.

Larson's narration of her first conversation makes it appear that Keil wanted to see her only to tell her that there were no first-shift jobs. He offered her a job on the second shift just as an aside, if she were desperate, knowing that she was able to work only on the first shift. If that narration was accurate, there would have been no reason for her to ask Webb and Davis in the second conversation why she had not been recalled, because she was well aware that only second-shift jobs were available and she had rejected Keil's offer of a job on that shift. Also improbable was her testimony that Webb confessed that Respondent had treated her badly. That is not something that a supervisor would normally say, and there is nothing in the record that would lead Webb to say that. I credit Webb's and Davis's specific denials, noting that some of their testimony was not mutually corroborative, including their recollections about the length of the conversation and the number of drinks ordered. I credit specifically the testimony of Davis. Although not crediting him always, I was impressed by his recall, candor, and sincerity. Accordingly, I find that neither supervisor committed an unfair labor practice and further find that this conversation does not support the General Counsel's contention that she was not rehired because of her union sympathies.

Returning to Larson's September conversation with Keil, the General Counsel contends that the recall of Larson in September was conducted differently from all other recalls. A personnel action form was completed for each employee who was recalled to work. The forms, including Larson's, note that the employee was discharged for refusing to work the second shift. (Larson, on a separate form, is listed as a "quit.") Never before had Respondent generated this type of documentation, and it was done differently "because of the Union's organizational campaign." The General Counsel is probably right, but that does make Respondent's actions unlawful. Keil was trying to protect himself in the event that a complaint about Larson's treatment arose, as it did. And, in furtherance of his attempt to protect Respondent, it is improbable that, if he were really trying to establish a reason to discharge Larson for turning down the second-shift job, he would have made any mention, as Larson testified, of calling her back later or making it appear that the offer was anything less than the unconditional offer of one position, to be filled immediately. Accordingly, I discredit her narration of her conversation with Keil in September and find that Keil offered her a job on the second shift, as he testified.

That finding does not fully dispose of the issues relating to her recall. Keil knew, at least at the time when Larson first applied for a job, that she would work on the first shift only. Whether that stuck in his mind, and he, with calculation two years later, offered her a job that he knew that she would decline, is another matter. That is what the General Counsel and the Union really claim, and there is substantial basis for their position. Ball had asked Larson shortly before the May 12 layoff whether, if given the opportunity, she would choose between going to

second shift and being laid off. She told Ball that she could not work second shift because she had no child care for her son; and, as a result, she was laid off. On the first day of her layoff, she went to Keil's office to say goodbye. He asked her if she was happy, and she replied that she was going to miss work, but she did not have child care lined up, so it made things easier.

Keil was also well aware that Larson was a working mother, having helped her earlier in the year to get information about a special medical plan for working parents, in part because he had refused her request to become a permanent employee and thus become entitled to medical benefits from Respondent. And, assuming that Keil forgot Larson's status as a working mother, his recollection had to be refreshed when Larson testified at the representation hearing on August 24:

I was sort of in a homeless state. I was staying with a friend. I didn't have a house. My son, I couldn't get him into school until I had a permanent residence. I'm a single parent, and I didn't get child support, or anything like that. So, I need to make money to support him.

Keil did not directly deny knowledge of her status, except to contend that, during the time that Larson worked for Respondent, she worked at Jerry's Bar at night, a fact that he knew, because she had served him. Larson testified that she did that job for less than a month, for five hours twice a week, and that she was able to do that because at the time, she was living in an apartment over the bar, and her son could be close to her, even though she did not have a sitter for him. That explanation may be accurate, but it is not proof that Keil was aware of the circumstances of her working at night. On the other hand, Keil had to recall that, later, she refused Ball's offer of a second-shift position because she could not obtain child care for her son. Another offer to her of a second-shift job would certainly be rejected, as it was.

That, in Keil's mind would solve two problems, the first being Larson's union activities. The second was his belief that Larson had lied at the representation hearing, as he told both Simmerman and Slee in August or September, adding that for that reason he would not recall her. At the hearing, Keil testified: "Her testimony implied that I had told her at her initial interview that she would never be laid off, and I just don't do that." Keil was wrong. Larson's testimony at the representation case hearing was that, in response to her concern about the chance that she might be laid off soon after she started, Keil told her not to worry about it, that Respondent had not had a layoff the past summer and "in a while."

Keil also claimed that Larson also testified that Ball had told her that she would become a permanent employee, and he never did that. However, Larson merely testified that Ball never told her that she would never become a permanent employee and that as long as she gave the job her "100 percent," she could expect that she would become a permanent employee. She gained that belief from reading a document that all temporary employees had to sign upon being employed, which was an understanding that the employee was temporary and entitled to little. But the document held out hope of becoming a permanent employee and stated that skill, ability, and physical qualifications would be used in determining whether an employee would become permanent and that, if those were equal, attendance and attitude would become determining factors.

I conclude that Larson did not lie at the representation hearing, that she was truthful in stating her understanding, and that Keil incorrectly inferred that she was lying and threatened in violation of Section 8(a)(1), in his conversation with Simmerman and Slee, that he would not

recall her because of her testimony. His feeling about her testimony and about her union activities motivated his recall of her in September to a job that he knew she would not accept.⁶ His offer was a sham.⁷ He never made a valid offer. His September conversation with Larson only confirmed what he had known before, that she had parental obligations that would not permit her to work on the second shift.⁸

The conversation, however, also confirmed to Keil, or at least should have, that Larson was anxious to return to Respondent's employ. Keil acknowledged that Larson wanted her job back in the stain booth, a position that was ultimately available in late November. And Larson made known her desire to work to both Webb and Davis after the election and kept Respondent apprised of her current address and telephone number so that she could be reached. Yet Respondent never called her, despite advertising for laborers in September and November⁹ and hiring to positions that Larson could have worked dozens of new employees from late October, many of whom were inadequate, quitting or being fired within a brief period of time. And, while Respondent was urgently looking for help, it never once advised Larson that it had discharged her or considered that, by declining the recall, she was considered a "quit." It never told her that she had to reapply for a job, rather than wait to be recalled. In sum, Respondent delivered a sucker punch, recalling Larson to a job that it knew she could not accept and then denying her reemployment without informing her that she had to apply for a job. I conclude that Respondent violated Section 8(a)(3) and (4) and (1) of the Act by not recalling her.

Before considering Respondent's failure to recall Thomas and Banks, the other two known Union supporters who were laid off on August 8, there was one alleged unfair labor practice which pitted Simmerman and Larson against Keil, all of whom have some problems stating facts. Simmerman and Larson testified that, on election day, as they approached Respondent's facility from the outside to get to the stairway that led to the voting location, they saw Keil, Webb, and Jack Mickle, Respondent's maintenance supervisor, on a platform that once had been used as a loading dock, about 100 feet away from the stairway. The complaint alleges that they were engaged in surveillance, but there was no evidence that they were looking at any of the prospective voters. To Simmerman, they were just standing there; to Larson, they were talking. Thus, they were not engaged in surveillance.¹⁰

In addition, Respondent's witnesses rather uniformly testified that they were not even on the loading dock while the election was going on. Keil testified that he went out for lunch with Noll and Respondent's attorney, Fred Englehart, and remained at the restaurant during the entire period of the election, because his attorneys had requested that he remain away from the polling place. Mickle insisted that he was in the tool room during the entire election, busy operating a lathe. Webb testified that at the beginning of the election he was in his office in the

⁶ Respondent contends that Larson's father lived within 20 or 30 miles of its facility. There was no proof, however, that her father was able to take care of her son.

⁷ In light of this finding, it is unnecessary for me to consider the legitimacy or accuracy of Respondent's professed practice of offering a recall to an employee only once. Here, there was no legitimate first offer.

⁸ This is shown by his admission that, no matter what he did, an unfair labor practice charge would result, thus recognizing that he was doing something illegal by offering her a job that he knew she could not accept.

⁹ A job order indicates that on October 2, Respondent was looking to hire 12 production workers.

¹⁰ On cross-examination of Simmerman, Respondent's counsel asked: "Now, you also described some management officials, Mr. Keil, Mr. Mickle standing outside *watching*, I believe, is that right?" (Emphasis supplied.) Although Simmerman answered yes, he did not testify to that fact on his direct examination.

maintenance area with supervisor Mike Moss, a design engineer, and remained there until called by office manager Carol Brown “to conduct some business that couldn’t wait in the front office.” To get there, he had to pass through the tool room, where he saw Mickle working at the lathe. Webb conducted his business in the front office and then returned to his office by way of the tool room, where Mickle was still present, and remained in the tool room until the election had concluded. The only admission by Respondent to anybody being on the dock was by Mickle, who stated that, after the election was over, he went out onto the loading dock with Webb and Moss.

There were, however, a few discrepancies in the testimony of Respondent’s witnesses. Employee Tim Geer, whose prejudice is evident from, on one occasion, drawing swastikas all over a Union flyer and hanging it by a machine at work, and from distributing an antiunion petition, testified that he was present in the tool room, where he saw Moss, Webb, and Peterson, and Vice President of Operations Tim Miller. No one else, however, seemed to have seen Geer, who was the only person who said he saw Miller. Employee Rick Richards testified that he and Peterson left to vote close to 4:00 p.m., stating that he told Peterson they should get to the polls before they closed. On the other hand, Mickle testified that Richards and Peterson left to vote early in the 3:00 to 4:00 p.m. polling period.

There were problems with the General Counsel’s case, too, a bit more substantial. Simmerman testified that he was able to see the three supervisors from the steps leading to the polling place, but that was impossible because the dock was set back from the face of the building and the dock could not be seen from the steps. Simmerman recognized that, amending his testimony to state that he saw the supervisors before he started up the stairs, and they could particularly be seen if one were standing at the back of the line leading to the stairs. Rick Richards testified, however, that, when he went to vote shortly before the polls closed, there were about 10–15 employees lined up, waiting to vote, all inside the building; and there seemed ample room for even more people to wait inside the building. That would create doubt, with 51 employees voting, that there would have been a line outside at all. In addition, Simmerman testified that he saw all three supervisors standing on the dock, while Larson saw Keil only for a moment, as he “was outside, but he kind of came outside, spun around and walked back in.” Simmerman’s recollection of the route that the voters left after voting was at variance with Larson’s: Simmerman, near or through the door where the supervisors were standing, so that he “had to walk right past them after [he] voted”; Larson, the same way the voters came in. Respondent also contends that Larson incorrect testimony about the starting time of the voting as 4:00 p.m., whereas it was 3:00 p.m., destroys her credibility; but I reject this argument, because even Respondent’s witnesses saw her approach, accompanied by three or four other employees, during the hours of voting.

There is not much to go by to resolve this utter conflict, but the General Counsel did not sustain his case, presenting two witnesses whose credibility was in doubt and whose testimony was not wholly persuasive in supporting the contention that the three Respondent’s representatives were on the dock. Besides, even if the supervisors were where the General Counsel contends, it is not wholly clear that Board law would sustain this allegation. *Performance Measurements Co.*, 148 NLRB 1657 (1964), and *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982), both relied on by the General Counsel and the Union, found surveillance from the facts that supervisors sat or stood in close proximity to the entrance to the voting areas, from 6 to 15 feet away, or in places where all the employees had to pass in order to vote. Here, they were 100 feet away.

In addition, the record unfortunately makes it difficult to assess who had to pass near them on the way to vote. From what I can glean, most of the voters had to approach the voting

area from the outside steps,¹¹ but it is unclear how a voter got to those steps. I find that those employees who were working did not have to pass the supervisors to get to the steps, and they would have seen the supervisors only by turning their heads in the direction of the loading dock. Those who were laid off or otherwise not working, and the number was never spelled out, except that Larson said that she went to vote with five others, had to approach the steps from the parking lot, so they would have been closer to the supervisors. The supervisors were in a position to see the parking lot where these voters were coming from and were visible to any of these employees coming to the parking lot, whether on foot or in a vehicle, to get to the voting area. But they appear to be in the distinct minority. Board law does not make unlawful the innocent eye contact with a small percentage of voters. For all the foregoing reasons, I dismiss this allegation.

That brings us back to the two other temporary employees who were laid off on August 8 but not recalled. Keil told Thomas that he was laid off because of the loss of K-Mart as a customer. Keil did not know when he would recall Thomas, but said it would be a little while. He made no mention of any problem with Thomas's work performance. Indeed, but for Respondent's failure to recall Thomas in late September, one would not know that Respondent was having any trouble with Thomas at all. Hired as a full-time temporary employee on October 9, 1998, Thomas worked continuously for Respondent for two years, except for one day, prior to his 2000 layoff. At the end of 1999, he quit to take a job with another company, but was dissatisfied with that and, after missing one shift, was welcomed back by Ball, with the same seniority and at the same rate of pay as he had before. Respondent raised his pay regularly, and all increases that Respondent gave to its employees were based on merit. Some raises exceeded the normal merit raises, in recognition of his special contribution to Respondent.

Nothing uncomplimentary appears in his record. In March 2000, his then supervisor, Chris Dudenhaver, wrote that Thomas was "Doing an Excellent job in the Red Line Area." In June or July, Thomas had approached Keil with a problem that he was having with Martell. Keil was impressed that Thomas took the initiative and was concerned about something being done right. His work was thought of sufficiently well that Keil selected him in January to take inventory of products in the warehouse once a month because he was considered a good organizer. In June his then supervisor, Henry Regester, with Keil's approval, gave him the authority to write up orders if Regester was in a bind, a supervisory responsibility. Thomas also testified that he overheard his new supervisor, Davis, telling Dudenhaver in July that "they . . . had made Thomas into a good worker" and Dudenhaver responding that Thomas was a good worker before he was employed by Respondent. Thomas also testified that Davis asked him whether he had any brothers who might want to be employed at Respondent. Davis denied both conversations, and I believe him, principally because Dudenhaver had already been relieved of his duties before Davis started his job.

Davis, who had 17 years' employment with Respondent as a production employee, was hired in 2000 as a supervisor to increase production on the second shift (and Davis has, by 50 percent) and to solve what Keil perceived were problems caused by the fact that the employees "were running" Dudenhaver. Davis's first day as a supervisor by himself (just before, he shared supervisory duties with Regester for two weeks) was July 18, and within a week he began having trouble with Thomas, who was the material handler on the red line. Thomas was responsible for ensuring that the tow motor (forklift) operator had the appropriate information to supply continuously materials and components to the welders and the workers on the production line so that production was not interrupted. Davis wanted Thomas to anticipate the

¹¹ Those employees in and around the tool room could walk down the hall to the voting location.

needs of the welders and to ensure that they had sufficient materials to work on when they needed them so that production would not be interrupted. He specifically wanted bins of material brought down while the welders were welding. Thomas told Davis that he could not do that: it was a safety issue. Davis showed him that it was not and that the material could be transported without endangering anybody.

Thomas told Davis that he (Thomas) was “one of the first ones doing this job and that it was his job and he thought he was perfectly capable, seeing that he had done it, that his way was basically the best way.” Davis disagreed, telling Thomas that it was the way Davis wanted Thomas to do the job and not the way that Thomas wanted to do it. An argument ensued. According to Davis, “The more that I insisted that this is the way we were going to do it, the louder Sam got with me and the louder that I got with Sam; and it almost turned into a screaming match.” Thomas admitted this incident, noting generally that he knew the job better than Davis and that Davis “was hollering, so I was above his holler.” Davis did not discipline Thomas. He explained that he had been a supervisor only a week and was trying to give everyone the benefit of the doubt and trying to feel everybody out to see where everyone fit in the best. But he did advise Thomas of the need to follow his instructions.

The problems, however, continued. As Davis explained:

It didn't matter what I went . . . to Sam, about. He was always argumentative to me. He wanted to argue about everything. He always had a smart answer to say to anything that you wanted him to do. He had a smart comment or a smart, you know, answer back to you. He was, basically, a difficult person to work with. . . . Every time I told Sam to do something; or even if I asked him an opinion, he would have a smart answer.

The General Counsel has presented a prima facie case of discrimination under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Thomas was a Union supporter and was present at both representation hearings and sat with another Union supporter. He was one of three Union supporters whose picture appeared on the Union leaflet and who was not recalled. Keil assumed that he favored the Union. The General Counsel has proved animus from the other unfair labor practices found in this Decision and knowledge of his union activities and support. Respondent told him at the time of his layoff that it would call him back to work, yet after his support of the Union became known, Respondent did not recall him. In fact, Ball told Slee in August that Thomas would not be recalled because “he was a member of the union and he wouldn't call him back because of his support.” Slee had nothing personal to gain by testifying to this threat, which I conclude violated Section 8(a)(1) of the Act; and Ball had much to gain by denying the allegation.

The finding of a prima facie Section 8(a)(3) case, however, does not end matters. Board law holds that, even if Respondent failed to recall Thomas for reasons that violate the Act, if Respondent showed that it would have taken the same action even in the absence of Thomas's union activities, it would escape liability. *Wright Line*, supra; *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Respondent has demonstrated that it did not recall Thomas, not because he was a bad worker, but because of his failure to get along with Davis, and that it would have refused to recall Thomas even in the absence of Thomas's union activities. Davis did not want Thomas back

[b]ecause of problems that I had with Sam always wanting to argue with me. I was trying to get control of a shift and he was being defiant towards me, and

other people were seeing that and picking up on it and it was already a troubled shift and it was just one less trouble I needed to have.

Keil agreed with Davis's recommendation, recalling that Martell had told him of incidents several months earlier when Thomas had grabbed papers from Martell's desk, accused Martell of favoring first shift with his orders, and spoke to Martell rudely and improperly, "[j]ust real argumentative and combative." Martell testified to the following experiences in June or July:

Thomas would come in early to report to work and it was during shift change. He would come in a little bit early and get prepared, at which time I was dealing with my employees plus dealing with the second shift supervisor, trying to assign jobs for everybody.

He would come over while I was working at my desk and he would grab paperwork out of the desk that I had prepared for second shift, and he would tell me that I was favoring first shift. He was making accusations where I was favoring first shift, not writing up the orders, the big orders for us and giving him the junk orders on second shift so he would have to work harder and he'd get lower production.

Martell thought that this conduct was clearly disrespectful, although it technically did not constitute insubordination because Thomas was employed on the second shift, and Martell was a supervisor on the first shift. But Keil heard about Thomas's conduct and cautioned him not to be disrespectful to a supervisor. That could lead to insubordination, and Keil did not want that to happen.

I accept Davis's explanation that he found Thomas difficult and on the "borderline" of insubordination; but, because he was new on the job and the incidents occurred within the first two and one half weeks of his taking sole supervision of the shift, he did not formally reprimand Thomas. The constant arguments with Davis were sufficient to constitute disrespect, "borderline," Davis testified, within the meaning of Respondent's rules, and sufficient to justify not recalling him. There is no telling what would have happened had Thomas not been laid off, but the relationship between the two was no doubt uncomfortable. Thomas impressed me as convinced of his own infallibility and unable to follow instructions of his supervisor or superior without a comment or an argument. This is not to say that he was always incorrect, but his attitude would surely not appeal to the normal supervisor; and Davis, as a new supervisor, was not ready to let an employee question his authority.

On making decisions concerning the selection of the laid-off employees to recall, Davis was entitled to prefer those with whom he had no trouble. Respondent does not always recall laid off temporary employees. Respondent has refused to recall others who were deemed unsatisfactory. For example, it did not recall two other employees, Albert O'Neil and Wayne Phillips, based on the fact that one started to miss work and the other was lazy. (One had signed an authorization card, the other had not.) The General Counsel contends that Davis was capable of terminating an employee when he needed to, citing former employee John Post. Post's misconduct was much more serious: unlike Thomas, Post refused Davis's order and walked off the job. I conclude that Thomas's Union support and his appearance at the representation hearing (he did not testify) had nothing to do with Respondent's decision not to recall him. Accordingly, I dismiss the allegation that Respondent's decision not to recall Thomas under Davis's supervision violated the Act in any way. There has been no showing that jobs were available for his skills under others' supervision, to which he should have been recalled.

The last of the three employees laid off on August 8 and not recalled was Banks. The General Counsel and the Union contend that, of all the employees, Banks did his work proficiently and consistently met the production goals set for his job on the inside and outside presses. There is a prima facie case here. Banks was in the photograph and identifiable as a Union supporter, although there is no other evidence of his Union activities. In fact, the General Counsel never offered an authorization card for him. But the fact that he is one of three persons in the photograph who was not recalled is sufficient to support an inference of a discriminatory motive. In addition, he received no discipline and was consistently given merit wage increases based on positive evaluations by his previous supervisor. The Union correctly points out that on April 14, 1999, Dudenhaver gave Banks a merit increase and evaluated him: "Excellent Attendance Good Attitude, making Rate Inside Press & other machines." Banks was recalled to the first shift on July 3, before the Union organizing campaign, and was transferred to the second shift on July 18, because he was "Needed for Inside Press."

However, the failure to meet production goals was not what Respondent relied on in failing to recall him. Davis, who was hired by Respondent to increase the production of the second shift, wanted employees who would be able to operate more than one machine, so that they could fill in for the absences of their colleagues and operate other machines needed to produce a particular product. Davis tried Banks at a variety of jobs other than the ones that he so ably handled, and Banks failed at all of them. Davis explained:

I tried Ernest at different jobs on the line. I took him over to hang columns. He couldn't do that. He wasn't strong enough. He said he was too small to do it. I took him to try taking jacks off and taking columns off. He couldn't do jacks. He said that it hurt his back, stacking jacks. Taking columns off, his mathematical skills weren't the greatest. He couldn't keep count. He would lose count all the time. He says he wasn't physically able to stack the columns either and I kind of.. At the time, being a short shift, I kind of set [sic] "okay" and I took him over and I threw him on an outside press and I showed him how to run the outside press, which is one of the easiest machines I have to run. That's basically where I left him. I tried him on the drill or on the thread rollers one night and it lasted for about five minutes. It's an air operated machine. You put the screw in it. You flip the lever. You flip it one more time and it feeds itself in. It's a fast machine and Ernest wasn't a very fast person. After about the fourth try, I saw him there and I knew I would end up in the hospital with him before the night was over. So, I pulled him right back off there and took him to the outside press and he basically stayed there for me for the couple of weeks that he was working.

In Davis's opinion, Banks "didn't catch on quickly. He wasn't able to do the jobs that I needed him to do. Basically, I had to pick the easy jobs that I had to put Ernest on." Although Davis never reprimanded or issued a written warning to Banks for his performance, he did talk with him to find out the reason that he had low production when Banks produced less than he should have, because Banks was working on the easy machines.

Banks did not testify, and there is no evidence to rebut Davis's testimony. Because Respondent needed employees with more skills, Banks became expendable. Anyone could perform his job, and Respondent was justified in making the choice not to recall him. When Keil asked Davis about his assessment of Banks, Davis knew that he could have only two machine operators, one maintenance man, one tow motor man, and enough people to run the line. One of the machine operators was Alderman, a permanent employee, who, because of a prior injury, was not able to run the line. So he could recall only one other machine operator. He explained

to Keil that the only two jobs that he was going to be running were drills and thread rollers; and he was

[scared] to death to have Ernest on the thread rollers and the drills are a high maintenance machine and I didn't think he was capable of doing it and he already proved to me that he couldn't work the line. So, if somebody missed off the line, called in sick or took a vacation day, I couldn't even go over to get him to come in and fill in.

Davis recommended to Keil that Banks not be recalled, that he "needed somebody else that was able to do more jobs." He cogently explained his reason:

On first shift, if you have a couple of employees that aren't great producers or highly motivated people, you can move them around and give them jobs that they are capable of doing to keep them out of the way. On second shift, being so limited to the amount of people that I could have, everybody has to be able to do just about everybody's job and be able to fill in for. Just like I say, one or two guys are absent to the point that it almost shuts my line down.

The General Counsel and the Union contend that Respondent's decision not to recall Banks resulted from disparate treatment and that two less qualified employees, Don Kephart and James Grogan, were recalled instead of Banks. There are some severe difficulties with their position, not the least of which is the fact that both Kephart and Grogan, albeit not pictured in the Union leaflet, were Union supporters, having signed Union authorization cards. Kephart was thought to be valuable enough of as an employee, despite what might appear on first blush as unimpressive production statistics, that he was not laid off with the other employees on August 8. Grogan, unlike Banks, could run the drill machine, a skill that Davis needed. Banks was not recalled due to lack of versatility, not lack of productivity. In addition, the fact that Kephart and Grogan may have performed poorly on certain machines did not mean that they performed worse on the variety of machines that Davis needed them to run. Even their production records are not necessarily meaningful. Davis, who formerly worked for Respondent as a production employee, cogently explained that production is subject to numerous variables, such as mechanical or maintenance problems, and comparisons of the difficulty of operating machines is almost impossible. Finally, the fact that the Union attempts to compare the production records of other employees who have so few days working on machines indicates that they did not work primarily on machines, but were able to do the kind of line work that Banks could not.

I find that Respondent's decision not to recall Banks was not the result of disparate treatment and conclude that Respondent has demonstrated, under *Wright Line*, supra, that it would not have recalled Banks in September, even in the absence of his minimal union activities. However, in contrast to the General Counsel's failure regarding Thomas to prove the availability of other jobs for his skills, a job order¹² demonstrates that on October 2, Respondent was looking for production workers to run machines, including presses, on the first shift. Respondent did not prove any lawful reason for failing to recall Banks to the first shift, on which Davis explained, quoted above, "[I]f you have a couple of employees that aren't great producers or highly motivated people, you can move them around and give them jobs that they are capable of doing to keep them out of the way." There is no question that Banks could have ably operated the presses. Accordingly, I find that Respondent has not met its burden of proving that

¹² G.C. Exh. 107.

it would not have recalled Banks, even without his union activities. Accordingly, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act.

Before mid-May 2000, one other employee, Janet Hart, worked in the front office with office manager Brown. Hart was the receptionist. She answered telephones and helped to coordinate, print, and send orders to the shipping department. Because business was slow, Hart was laid off. Respondent had no need for two full-time employees in the office; but, in order to cover the telephones before Brown came to work at 8:30 a.m., it assigned McGill, who, among other duties, processed paperwork, checked on orders, recorded incoming material, shipped UPS packages, computed costs of outgoing freight, selected freight carriers, prepared master manifests, and made and designed labels in the shipping department, to work in the office from 7:30 to 8:30 a.m. She was also to spell Brown for the hour that she took lunch, and she was to assume Brown's duties when she took vacations. Her assignment occurred before the representation petition was filed and is not the subject of the complaint.

But the complaint does allege a Section 8(a)(3) violation, when on October 6, precisely a week before the election, Respondent made her a salaried instead of an hourly employee. Respondent tried to explain to McGill at the time and to prove at the hearing that the change benefited McGill, but it is not clear that it did so. Certainly, Respondent would no longer deduct hours from her pay when she went to medical appointments; and she would no longer pay \$5 per week for uniforms or pay for her steel-toed shoes. On the other hand, when McGill compared her new flat salary rate with what she made before, which included overtime for which she would no longer be paid, she thought that she would be losing \$500. Respondent did not prove that she was incorrect. When McGill questioned Keil that she would actually be losing money and asked whether the change to a salaried status was optional, he told her: "[T]hat's the way Ron Noll wants it." Noll, whom Keil consulted before making this decision, did not testify in this proceeding, and I infer that he would have had nothing favorable to say on Respondent's behalf.

Respondent's change of her method of payment, from hourly to weekly, had nothing to do with benefiting or hurting her. Keil explained that the change was prompted by her spending more time in the office, that there were sensitive documents in the office ("orders coming down, other documents coming down with prices and monetary information of some type"), and that there were meetings conducted in the conference room. "I thought it was appropriate if she was going to be in that type of position that she should be a salaried person." He clearly implied that she was going to be an office worker. But her duties never changed. She spent only an additional 20-30 minutes per day in the office, remaining after Brown arrived in the morning until McGill finished whatever she was working on at the time. As she had been doing for five months, she answered telephones, sorted and filed some papers, and did some typing. She never handled or worked with any personnel-related issues, payroll, time cards, or anything remotely confidential. She spent her remaining time of about five and one-half hours per day in the shipping department. I conclude that Keil's testimony was false.

McGill was a Union supporter, attending Union meetings and even recording the minutes of one. But she left another one before it was over and before the photograph of the Union supporters was taken, the one that ended up on the Union flyer. There is no evidence, however, that Respondent knew of these activities. On the other hand, if McGill's testimony is to be believed, during September and in October, up to the time of the election, she spoke with Gagen about the Union two or three times a week, the conversations often starting with Gagen's negative comments about the Union. "[H]e'd ask me if I was for the union. He'd ask me why I was for the union or what the union could do for me. And he'd continue with how bad they were

and all the bad things that would happen if they got in." According to McGill, she replied: "I was for the union, that I thought they'd help out, help some of the people out in there."

She specifically recalled one conversation that occurred after one of Respondent's mandated antiunion meetings, which commenced shortly after the Union filed its representation petition, when Gagen asked her, Simmerman, and Slee how the meeting went. McGill replied that "[A]t least we didn't call anybody names." (During the meeting, Geer had called anyone with prounion interests, "Communist bastards.") Gagen started again telling the employees how bad the Union would be. McGill said that she thought the Union would help protect some of the people that were being picked on, such as some of the retarded people or the women. This conversation, however, was not corroborated by either Simmerman or Slee, nor were any of the other conversations that McGill testified to, despite the fact that she recalled that sometimes Simmerman and Slee were there. The only testimony from Simmerman was that Gagen had to be aware of McGill's sympathies because Simmerman and she talked openly and freely around him, that he saw them with Union flyers at break time, and that they never tried to hide the fact that they supported the Union. But McGill never corroborated Simmerman's testimony that she engaged in any conversations in favor of the Union with Simmerman when Gagen was present, or that she and Simmerman gave Gagen Union literature during those conversations. And Simmerman testified that McGill never said in his presence "out loud" to Gagen that she was in favor of the Union.

On the day of the election, Noll came into the shipping department and told McGill that he needed her to vote against the Union, which he said was bad because he was in one. He said that he would not retaliate against anyone who voted for the Union, but he would still like her to vote against it. He paused, waiting for a response; but McGill did not reply immediately. So Noll "got up and started pacing, and asked . . . if I would vote against the Union." McGill answered that she would. Noll left, followed by Gagen; and they stopped and talked for ten minutes. Gagen returned and said that Noll did not believe her and thought she "was *still* pro-Union." (Emphasis supplied.)

Gagen denied that this took place and denied that he knew anything about McGill's sympathies, although he admitted that, later in the day of the election, at quitting time,

Bonnie said "Can I talk to you for a minute?" It was kind of strange because she doesn't say a lot to me. She will say "Good night" and that's it. I said "What do you want, Bonnie? I'm busy." She said "Jim, I just want to let you know. I voted no for the union." And I looked at her and I thought, I didn't want to get into this conversation. I said "Bonnie, that's your right, your God-given right." She said "Well, wait a minute. I discussed it with my mother and I thought it was for the betterment of the situation and I voted no." I said "Bonnie, I can't discuss this with you." I said "Thank you" and I walked away from her.

As noted above, Noll did not testify. I infer that he learned from Gagen about McGill's prounion feelings and, to avoid her unfavorable vote, converted her into a salaried employee a week before the election, in order to urge that she was an office clerical employee, a class of employees that had been specifically excluded from the appropriate unit. In fact, Respondent challenged McGill's vote, consistent with the motive I have found and Noll's belief that she was not going to vote against the Union, as he had urged, and despite the fact that McGill's name appeared on the *Excelsior* list.

It is utterly improbable that the reasons Keil gave for her change of status could be truthful, in light of his testimony that from the outset of her employment, six and one-half years

ago, he had noticed that she was slow and unmotivated. Transferring her to an office clerical position, her unsatisfactory conduct continued—“[S]he was very, very slow. She was very, very unmotivated”—as could only be expected from his prior experience. In fact, Keil now described her as “lazy.” Why he would decide to transfer a slow, unmotivated employee into the office, where she would presumably handle documents of great importance to Respondent, was left unexplained. Keil could equally expect, as he confirmed in his testimony, that Brown would have “a great deal of difficulty in working with her.” And that is what happened. And his transfer of McGill to an office position where she would be exposed to confidential material was unlikely in light of the fact that both Keil and Brown harped on an incident that occurred a few years before: when McGill, who was then not working in the office, told Gagen, her supervisor in the shipping department, about the fact that an employee was going to quit before the employee actually did. Her alleged breach of confidentiality and her slow working habits and lack of motivation are no reasons for making her a salaried employee. The reasons must be other than those that Keil relied on. In fact, according to Keil, the decision to make her a salaried employee was what Noll wanted; and Noll did not testify.

I conclude that Respondent violated Section 8(a)(3) of the Act by changing McGill’s employment status in an attempt to deprive her of her right to vote in the election and in an attempt to discriminate against her for her support of the Union. I also conclude that Noll tried to convince McGill unlawfully to vote against the Union. That McGill walked up to Gagen and spilled out her heart, as Gagen testified, about how she voted makes sense only if she had had her previous encounter with Noll. Noll’s conversation the morning of the election constituted an unlawful interrogation about how McGill intended to vote in the election. Even though Noll, Respondent’s principal officer, said that he would take no action against those who voted against the Union, he obviously tried to pressure and coerce McGill. Gagen’s return to her after his discussion with Noll to tell her that Noll did not believe her had to create more coercion. Although I find McGill’s testimony about the number of times that she had similar conversations with Gagen inflated and exaggerated, I am nonetheless convinced that Gagen asked her about her feelings regarding the Union and relayed McGill’s responses to Noll, which prompted Noll’s attempt to gain her vote and which caused him to believe that she was “still” pro-union. Finally, Gagen unlawfully interrogated her at a time when Respondent was committing other unfair labor practices. I conclude that both Noll and Gagen violated Section 8(a)(1) of the Act. *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000); *Rossmore House*, 269 NLRB 1176 (1984), *enfd.* sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

Three weeks after the election, on Friday, November 3, Keil fired McGill, telling her that Noll had been looking for an outside source to make labels, that Keil had found someone else to do them, that her job no longer existed, and that she would be laid off permanently with no call back. In fact, Respondent did not contract out any label-making until March 2001. So the reason given by Keil for McGill’s immediate termination, a decision that he made after consulting with Noll, was false. With the showing of McGill’s union sympathies, Respondent’s knowledge of them, Respondent’s earlier attempts to deny McGill an opportunity to cast a ballot in the Board-conducted representation case, and Noll’s displeasure with her pro-Union sympathies and his failure to testify, thus warranting an inference that his testimony would have been unfavorable to Respondent, the General Counsel has presented a strong *prima facie* case of a Section 8(a)(3) violation.

Respondent contends that it would have discharged her anyway, Keil justifying his termination of her as “no[t] so much based on performance issues, it was based on business downturns.” Contrary to what Keil told McGill when he terminated her, Keil claimed at the hearing that an employee from the marketing department of Respondent’s Cleveland office designed the labels, which were sent to McGill, whose duty was to transfer the text into a label

form and then produce a label. Respondent lost business from three customers, including Menard's, a million dollar account, which required labels. Thus, Respondent was no longer going to design them; and McGill no longer had enough work making labels.¹³ What was left of her label-making duties was something that other people, including supervisors, could do. Respondent did not want to keep her in the front office, because she and Brown did not get along. Regarding the rest of her duties, Gagen had to take over some of the clerical work that he had to do before. Gagen supported Keil's claim, in part, by testifying that his department was not that busy and, when told by Keil that he was going to discharge McGill, he offered no resistance.

The resolution of this issue narrows to whether or not I believe Keil, who made up facts and testified so improbably in defense of Respondent's decision to make McGill a salaried employee.¹⁴ In addition, he gave McGill a false reason about the reason for her termination; and he testified that the decision to discharge her resulted from discussions between him and Noll, from whose lack of testimony I draw an adverse inference. McGill had been an exemplary employee for six and one-half years. She had never been disciplined. She had first worked in the front office in about 1996 or 1997, filling in for Brown when she was sick or went on vacation. Even after Hart had been hired, McGill filled in from time to time. She ran the shipping department when Gagen was not there. As late as late September, Gagen said that he would go crazy if McGill were not around to help him. The shipping department was not idle, as Gagen testified. McGill said that she was very busy, very often giving up her break time to continue working. Contrary to Keil's testimony that McGill's label making functions had dried up, she estimated that the customers which were lost made up at most 10–20 percent of her time spent in making labels, which averaged about one and one-half hours.. Even Gagen testified that, before the loss of those customers, McGill spent 45 minutes or an hour making labels; and, after, one hour. So, the loss did not materially affect the amount of her work. She still had ample work to do.

Respondent claims that business generally was slow, but less than two months before, Respondent promoted five employees from temporary to permanent, on the ground that work was picking up, even citing the acquisition of new business. And, assuming that work was slow in the beginning of November, Keil admitted that Respondent's need for temporary employees typically began in November, to produce its summer line of outdoor furniture. In fact, Respondent placed newspaper advertisements for laborers and welders in September and November, and its job order showed that it intended to hire 12 more employees, thus leading to the production of more items and, presumably, the shipment of more products by the shipping department.

Finally, Respondent contends that it must have terminated her because she was no longer needed because it did not replace her in the shipping department; but it certainly added to the work of Gagen, who Keil recognized wanted her as an employee so that she could handle

¹³ Gagen contradicted Keil, testifying that Keil's emphasis when terminating McGill was on the fact that orders were slowing down, the furniture business was at 20 percent of 100 percent, and that there was not enough for McGill to do. Respondent's records reveal that McGill was laid off because of lack of work.

¹⁴ I note also that I do not believe Keil's testimony that, when his counsel sent him a position statement supplied to the Regional Office, he did not read it for accuracy. In addition, Keil also tried to minimize McGill's ability to make labels by showing how easy it was, citing a recent example of correcting a particular problem in 10 minutes. Gagen testified, however, that Keil did not solve the problem and that no one could, because Respondent did not have a printer that was able to make the label that the customer had requested.

some of his paperwork. In addition, it appears that Respondent transferred much of the label producing to Denny Buzikowski, who, even though he worked in the same location as the shipping department, was not a member of it. (Although not a supervisor, neither was he a unit employee.) Respondent replaced McGill in the office with Brown's sister-in-law for five hours daily. Work that McGill did before in the shipping department, such as combining bills of products sent to the same place, was given to Gagen, who then took it to the office, where the papers were worked on and then returned to the shipping department. So, this newly hired employee, Brown's sister-in-law, was doing McGill's work, albeit in a different location.

At a time when Respondent had incurred increased labor costs by promoting five employees and was hiring new employees, its discharge of McGill was not an attempt to save money because of a downturn of business. I do not find Keil credible. Accordingly, I conclude that, under *Wright Line*, Respondent has not proved that it would have terminated McGill but for her union activities and that Respondent violated Section 8(a)(3) and (1).

There are three other Union advocates whom, the complaint alleges, Respondent discriminated against because of their Union activities. Bill Richards worked on the second shift. According to Simmerman, Richards was the key organizer on the second shift. Although Richards had asked repeatedly for years to be transferred to the first shift, it was not until September 22, four days after his likeness appeared in the Union leaflet, that he was reassigned to first shift. Respondent had a vacancy for a tow motor operator on the first shift. Keil claimed that he knew that Richards, who operated a tow motor, had wanted to move to the first shift for a long time; and so he reassigned Richards to that shift for that job. He forgot, however, at least so he testified, that Roger Cramer had successfully bid in January 2000, eight months before, for the tow motor position on first shift. As a result of a work slowdown, Cramer had lost his tow motor position and been put back on the line. He still had more seniority than Richards and was upset that Richards was given the job that was rightfully Cramer's. He successfully claimed that job, and Richards lost it.

The General Counsel contends that Respondent transferred Richards to rid itself of the leading Union activist on the second shift. Simmerman testified that Richards "[j]ust did a better job with people on second shift than the other fellows did. Talking to them and letting them know what was going on." However, there was no proof that Respondent had any inkling of Richards' status, other than his being pictured on the Union leaflet. Others who were pictured, Union committeepersons Weikal and Alderman, were left on the second shift. Around the same time, Respondent transferred employees Miller and Black, both Union supporters whose pictures also appeared on the Union leaflet, to the second shift. The result of Richards' move to the first shift, in other words, did not leave the Union helpless in espousing its cause; and it is difficult on the basis of this record to find that this transfer—and transfers of employees from one shift to another were not unusual—was at all harmful to the Union cause or caused harm to the Union movement, such that an affirmative finding could be made that this was the reason for the transfer. Without proof of an unlawful motive, this allegation must be dismissed.

I am also persuaded that Keil was attempting to fill a need that Respondent had, at the same time trying to please Richards, who had long sought to move to the first shift. The General Counsel questions the motive behind Richards' transfer by contending that there was no longer any one on the second shift qualified to operate the tow motor. But Black, a temporary employee, to whom the position had been assigned, although not having the experience in operating the tow motor, was described by Keil as "a welder and a very versatile guy in every way" and, perhaps more importantly, as stated above, was pictured in the same leaflet as Richards. Finally, there is no proof that Respondent attempted to punish Richards, who, although professing that by the year 2000 he was at last satisfied to be on the second shift, and

thus by implication dissatisfied with his new assignment, never asked to be reassigned to his old position. More than that, he told Davis he was happy to move to the first shift. According to Davis, Richards was so excited and elated that Davis said: "God, I can't wipe the smile off of your face today, can I?" and Richards laughed and replied: "Nope. You sure can't." Richards' later bid on a second shift position is not the same as directly indicating to Keil his dissatisfaction with his new assignment.

That Richards later became dissatisfied with working on the first shift was unfortunate, but not a violation of the Act. Keil had not seen Cramer operating the tow motor for four or five months and simply forgot about him. When Cramer objected, Keil recognized his mistake, put Cramer back on the tow motor, but kept Richards on first shift, thinking that he was happier there. I conclude that the General Counsel did not establish a prima facie case. There is no proof that the transfer was discriminatory. Assuming that it was, I am persuaded that Respondent would have transferred him in any event, except if Keil had remembered to check on Cramer's seniority. I dismiss this allegation.

In January 2001, Richards' supervisor, Regester, transferred Richards from a job where he had been checking parts, a job which did not require him to work on a machine, replacing Richards with a temporary employee, to a job where Richards had to work on a machine, a job that he had performed before. Richards, having heard a rumor about Noll being "after" him and wanting him assigned to machines, repeated the rumor to Regester: "[Y]eah, . . . Ron [Noll] wants to see me work my ass off," to which Regester answered: "[Y]ou got it." Richards explained in detail that his new job was "a lot harder," and Respondent offered no proof that it was not. In fact, Regester did not testify; and so what is left in this record is proof that Respondent reassigned a known Union advocate to a more difficult job solely to ensure that he worked harder. Noll did not testify, and so there is nothing to show that the reassignment did not result from Richards' union activities or that Regester's remark was harmless banter or a "joke," as Respondent insists, or that Respondent would have made the same decision even in the absence of any union animus.

I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by assigning Richards to the more onerous job. In addition, by making the assignment in the manner he did, Regester violated Section 8(a)(1) of the Act by affirming to Richards that it had assigned him to a more onerous job because of his union activities. The General Counsel also contends that the same action was taken by Respondent because Richards had provided an affidavit on November 8 about a statement made by Webb and that Respondent must have understood that evidence on that issue could have been provided only by Richards. (Richards alleged that he was walking to the Arlington Hotel for a Union meeting after work, and Webb drove by, rolled down his window, and told Richards to have a nice meeting.) Although Respondent knew that Richards filed an affidavit, there is nothing in this record to prove the date that Respondent gained that knowledge. Accordingly, there is no evidence that Respondent reassigned him to a more difficult job because of his participation in the Region's investigation. Accordingly, I dismiss the further allegation that Respondent's conduct also violated Section 8(a)(4) of the Act.

Respondent had a rule that no one other than employees were allowed in its building. That rule existed at least since 1995, but was honored in the shipping department somewhat in its breach. For example, Simmerman's wife used to bring him coffee or breakfast. She would walk in the door, about 30-35 feet or more away from where he worked, and bring it to him. But in about 1995, Respondent reprimanded Simmerman. So, she stopped coming in the building, but would still bring him coffee, stopping outside; and he would go out and get it at break time. On occasion, however, when it was snowing or cold outside, Gagen invited her to come in and

sit in the office while she waited. Gagen and the employees also ordered pizza on occasion, and Gagen would permit the delivery person to enter the shipping department.

In December 2000, Simmerman's wife stopped outside the "man" door (as distinguished from the overhead door) to the shipping department, as she usually did, and Simmerman went out to get his coffee, only to see Noll driving his car around Simmerman's van. The day after, Keil called Simmerman to his office and told him that he was going to be written up for insubordination. Simmerman asked why, and Keil said that Simmerman's wife had dropped off his coffee and she was told not to enter the building. Simmerman protested that she did not come in the building. Keil told Simmerman to go back to work, without giving him a reprimand. Later in the day, Gagen told Simmerman to report to Keil's office, adding that Simmerman would be happy with what "we" did for you today. There, Keil told him that he was just going to receive a verbal warning and said that he thought that was going to make Simmerman happy. Simmerman replied that he did not see how any warning or any reprimand would make him happy, because he had done nothing wrong. Keil said that he was a man of "fine integrity" and that, no matter what anybody wanted, Simmerman should just go on home. He was not going to get anything. Although Keil admitted that he told Simmerman that he was not going to place the warning that he had previously prepared in his file, Keil retained the warning, unsigned, in his desk, in a file marked "personnel"; but Simmerman was never told that that was what Keil was going to do or did.

A number of weeks later, in early January 2001, Gagen said, somewhat rhetorically, "[Y]ou're not happy with that coffee incident with your wife are you?" When Simmerman said nothing, Gagen said that he knew that Simmerman had filed an unfair labor practice charge against Respondent. Simmerman stated that that answered Gagen's question. Gagen then said "[Y]ou were told to keep this between us and keep your mouth shut." The clear implication of all this is that Respondent's owner, Noll, who rarely came to the plant,¹⁵ was distressed at seeing Simmerman's wife on the property and had instructed Keil to take action. Keil prepared a written warning for Simmerman even before discussing the incident with him, but ultimately relented; he could not do it. But the event was to be kept quiet, so that Noll would not know; and Gagen was upset that Simmerman had filed a charge over the incident.

The General Counsel contends that, by these actions, Respondent threatened Simmerman with disciplinary action in retaliation for his Union activity and because he gave testimony at the representation hearing. I agree. Simmerman's wife had delivered coffee to him for years, without interference. She had violated no rule, nor had he. The original discipline no doubt emanated from Noll, who suddenly objected for reasons that, because he did not testify, can only be inferred. Those reasons must have been Simmerman's Union activities and his appearance at the representation hearing, because those facts are the only ones that were new. I conclude that Respondent violated Section 8(a)(1) and (4) of the Act. Keil claimed that he did not sign the warning so he did not actually issue it; but, in the circumstances, he did, although Simmerman was unaware of it. Keil maintained the warning. He did not throw it away. It must have been meant for use, possibly at a later date, to memorialize what happened. I conclude that, by actually issuing written discipline, Respondent violated Section 8(a)(3), (4), and (1) of the Act and shall recommend that the warning be expunged.

The General Counsel also contends that Gagen's warning that he was to have kept his mouth shut implied to him that he would suffer unspecified reprisals for filing an unfair labor

¹⁵ Noll began to visit the Linesville facility more frequently after the Union filed its representation petition.

practice charge. Although I have the feeling that what was really meant by the remark was that, despite Noll's desire to discipline Simmerman, Keil and Gagen were going against his wishes and merely wanted Simmerman not to discuss the matter any more, without any explanation from Gagen, I conclude that Respondent, by Gagen, violated Section 8(a)(1) of the Act. I do not find, however, that Gagen was interrogating Simmerman about the nature of the unfair labor practice investigation, but merely about Simmerman's reaction to the entire incident.

The complaint alleges that Respondent provided a new benefit to influence the employees' votes. Weikal, then a temporary employee, worked on Saturday during the week of Labor Day and was paid time and a half for that Saturday. The complaint alleges that the overtime payment was an inducement to temporary employees to vote against union representation. Keil testified, however, without contradiction, that the payment was no different from Respondent's policy: when any employee, temporary or permanent, had an excused absence during a week, whether for illness or a holiday, Saturday work was paid at the premium rate. Respondent's policy was based on the rationale that an employee would have been there, but for the excused absence, if work was available. Therefore, the employee should be eligible for overtime pay. Labor Day was considered an excused absence. There is no other testimony that Respondent provided a new benefit. Weikal testified only that, as a temporary employee, he had never received time and a half for any work he "had done around the time of a holiday." He never testified that he had worked on a Saturday during a week in which there had been a holiday and had not been paid for it at a premium rate. I dismiss this allegation.

The complaint alleges that Respondent, in addition to granting this benefit, through Noll, threatened employees with loss of benefits. The allegation arose from one or more "bargaining from zero" statements made at antiunion meetings held by Respondent. The governing law was stated by the Board in *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enf'd. mem. 679 F.2d 900 (9th Cir. 1982):

It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

The employees' recollections were, at best, inconsistent. Simmerman recalled that Noll warned the employees at one meeting in late September that they could not always believe the Union. "You don't always gain more when you negotiate. When you go to negotiations, you start at zero. Sometimes you get more, and sometimes you get less. Sometimes you stay the same." Slee testified on his direct examination that the one statement that struck him was Noll saying: "if the union comes in, we'd start at zero." But Slee quickly changed his testimony, noting that that was his "interpretation of it. Everything that we have was on the line. We would have to negotiate, just to get back to where we was." On cross-examination, Slee was not so sure about what was said. He could remember only that Noll said that he had worked for union shops before and "that things just don't start -- you don't start from where you're at." The other statement that he clearly recalled was "Everything was on the table."

Weikal testified that both Keil and Noll stated at more than one meeting that "we would start from zero. We'd have to negotiate everything over again." They specifically threatened, in front of all of the employees and on more than one occasion, that "we'd lose all seniority." On

cross-examination, Weikal also recalled that Noll said that everything would be on the table. "We could gain. We could lose. Or, it would stay the same." McGill recalled either Keil or Noll ("They were both talking") saying that "we would start negotiations back at zero, we would lose everything to start with, seniority, vacations, everything like that." Bill Richards recalled that Noll talked about negotiations and said that "when you go into bargaining, you need to start out at zero, with nothing, and from there sometimes you take and do not get what you already have, and sometimes you get what you have or more." On cross-examination, Richards also recalled that Noll made additional remarks: "that in bargaining, it can go up, you can go down, it can stay the same" and "there was no guarantees in bargaining."

Five witnesses called by Respondent, including two employees, testified that they never heard any management statement about bargaining from zero, except in answer to a question of another employee or, in the case of Webb, "a lot of employees" pursuing the question "[Y]ou mean we start from zero, we start from scratch?" (Webb was the only witness who heard the word "scratch.")

I find nothing illegal in the recollections of Simmerman and Richards. For example, an employer cannot take anything from zero. One cannot end up with less than zero. Yet, that is how the General Counsel must interpret Simmerman's and Richards' testimony to find a violation, because the statement made indicates that one starts from zero and then takes away from it. And so, what was really being talked about was the give and take of negotiations, in compliance with the Act. The other recollections are more serious, indicating that Noll, who did not testify to answer this particular complaint, crossed the line and threatened that the employees would have to gain back what he intended to take away if the Union won the election. On the basis of the record as a whole, including the inconsistent recollections of the witnesses called by the General Counsel and the acknowledged emphasis on the give and take of negotiations, testified to by all, I find that Simmerman and Richards testified accurately and that at no time was the threat made that benefits would be taken away and that bargaining would be conducted to reinstate those benefits. Although mention was made of bargaining from zero, in context, I conclude that Respondent did not violate Section 8(a)(1) of the Act.

Since at least July 11, and undoubtedly much earlier, because Respondent denied in its answer that it enforced the rule in the last 12 years,¹⁶ Respondent maintained the following rule which, if violated, constituted an offense under Respondent's disciplinary procedures:

Circulating petitions, selling of merchandise or services, or solicitation of any kind on working time or in working areas, includes: posting, removing, or distributing of literature on Company premises without Company approval. NOTE: Charitable collections for employees will be permitted on Company time with approval of the Plant Manager.

On about November 1, it posted and promulgated the identical rule (without the "NOTE"), applicable to temporary employees, the violation of which also constituted an offense under Respondent's disciplinary procedures.

Both rules are unlawful in two respects. First, Board law embodies a "long-held standard that rules banning solicitation during working time state with sufficient clarity that employees may solicit on their own time." *Our Way, Inc.*, 268 NLRB 394, 395 (1983); *Stoddard-Quirk Mfg.*,

¹⁶ Respondent did not, however, defend against this allegation on the basis of Section 10(b) of the Act.

138 NLRB 615 (1962). Respondent's rules unlawfully restrict employees from solicitation in working areas on non-working time. Second, although Respondent may lawfully prohibit employee distribution in work areas at all times, Respondent may not prohibit distribution in nonworking areas. *Hale Nani Rehabilitation*, 326 NLRB 335 (1998). Its rules limit distribution on "Company premises," which includes nonworking areas, such as Respondent's parking area or lunchroom.

It is true that, prior to the election, employees distributed literature in both the parking area and the lunchroom without discipline. On the other hand, the rules have a "chilling effect" on employees' concerted and protected activities, particularly those employees who are not courageous enough to risk discipline. The mere existence of an overly broad rule of this kind tends to restrain and interfere with employees' rights under the Act, even if the rule is not enforced. *Brunswick Corp.*, 282 NLRB 794, 795 (1987). When a rule of this kind is found presumptively unlawful on its face, the employer bears the burden to show that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution of literature in nonworking areas during nonworking time. *TeleTech Holdings, Inc.*, 333 NLRB No. 56, slip op. at 2 (2001). Respondent never did so. In fact, the second rule was enacted after the election and, although containing language almost identical to the other rule, was aimed solely at the temporary employees. Respondent did not demonstrate to its temporary employees, many of whom remain for only short periods of time, that it did not intend to enforce its newly adopted rule.

LaFayette Park Hotel, 326 NLRB 824, 826 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), relied on by Respondent, which held that a rule against making false, vicious, profane, or malicious statement had "no more than a speculative effect on employees' Section 7 rights, which is too attenuated to warrant a finding of an 8(a)(1) violation" has not been applied to no distribution – no solicitation rules. *Adtranz ABB Daimler-Benz v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), also relied on by Respondent, is distinguishable because the rule there applied only to conduct during working time and in working areas. Accordingly, I find both rules too broad and conclude that Respondent violated Section 8(a)(1) of the Act by adopting and maintaining them.

Three days after the election, on October 16, Davis, who was Weikal's supervisor, asked Weikal, after making small talk about his daughter, what he thought about the election. Weikal replied that he thought that it would turn out "pretty good." Davis said, "If you don't mind me asking, which way did you vote?" Weikal answered that he voted for the Union. Davis asked why he would do that, and Weikal said that he would like to see a change. At that time, the ballots had been impounded because of Respondent's appeal from the Regional Director's Decision and Direction of Election, which was subsequently upheld by the Board on March 19, 2001, and the ballots were counted on March 23, 2001. For whatever reason, Davis was trying to find out from Weikal, a Union supporter, how he voted. In the context of all the other unfair labor practices, I conclude that this constitutes an unlawful interrogation in violation of Section 8(a)(1) of the Act. *APT Ambulance Service*, 323 NLRB 893, 897, enfd. mem. 188 F.3d 514 (9th Cir. 1999).

A month later, on about November 17, Webb approached Simmerman at work, said that he "wish[ed] this shit with the Union was over," and told him that he wanted to ask him a question. Then, he asked whether he had ever spied on Simmerman at any of his meetings. Simmerman said that he did not know, to which Webb asked, "[W]hat do you mean you don't know?" Simmerman stated that he did not think it was appropriate for them to be having that conversation, and Webb agreed and walked away. This conversation might seem innocuous had it not been for the fact that, about this time, the Union had filed an unfair labor practice charge, subsequently dismissed, which included an allegation that Webb had watched

Simmerman as he walked into the Driftwood Restaurant at lunch time. Webb's questioning of Simmerman about his participation in an NLRB investigation can inhibit an employee's willingness to give any statement or otherwise participate in Board processes and violates Section 8(a)(1) of the Act. *Astro Printing Services*, 300 NLRB 1028, 1029 fn. 6 (1990).

In March 2001, Gagen gave verbal reprimands to Simmerman and Slee for mistakes that they had made in the course of their work. Simmerman sent certain goods to the wrong place. The General Counsel does not object to the discipline itself, but to Gagen's statement that accompanied the discipline:

Mr. Gagen told us at that time, Mr. Slee and myself, with the atmosphere the way it is in the shop now, I can't cover up any mistakes or protect anybody the way I have done in the past. He said if something was made wrong, skidded wrong, and tagged wrong, and we loaded it believing it to be correct, we would be held responsible.

Slee did not corroborate this incident; and, with my general distrust of Simmerman's credibility, I refuse to credit Simmerman's testimony. Besides, Gagen credibly denied that he had ever covered up for Simmerman's mistakes. Rather, he reported most of them to Keil, except when the mistakes were minimal and Gagen was able to correct them without expending any money. However, while recognizing that "everybody makes a mistake," he and Keil cautioned Simmerman: "[T]hese mistakes cost money. Right now, times aren't that good. We've got to watch this." Keil said to Gagen: "Let's watch your department. Let's be more careful. We've got to correct this." Gagen followed this up over the next week "Hey, guys, listen. No more mistakes. Let's be careful." And to Simmerman, in particular, he said:

Howard, under these circumstances, when something gets out of here and I can control it and I can get it free freighted back or I can get it dead-headed back and there is no cost involved, I can take care of this. But when we've got a problem or we are sending something out and I am paying the cost down. I'm paying the cost back. Repacking. I can't take of this. There is a cost factor here. Accounts payable and receivable will have it. I've got to write you up.

I find Gagen's explanation compelling and further find that Respondent did not change its policies regarding the handling of errors because of the activities of Simmerman and Slee on behalf of the Union. I conclude that Respondent did not violate Section 8(a)(1) of the Act.

Finally, on April 18, 2001, about two weeks after the first amended consolidated complaint issued, Gagen asked Simmerman why the Union had not dropped all its charges against Respondent. He wished that "this . . . all . . . could be over with and done with." Simmerman said that it could be done with that day, if Noll wanted it. The General Counsel contends that Gagen thus interrogated and impliedly threatened Simmerman. I find no violation, even crediting Simmerman, who was unable to recall this incident independently, without referring to his pre-hearing investigatory affidavit. First, I find nothing remotely threatening in Gagen's remarks. Second, the way that Simmerman related the conversation, there was nothing that indicated at all that Gagen's question was anything more than rhetorical.

The Bargaining Order and Additional Findings and Conclusions

As noted above, the General Counsel requests a bargaining order, which requires an examination of the Union's majority status and the nature of Respondent's unfair labor practices. With respect to the former, the General Counsel contends that as of July 31, three

days before the Union made its initial demand for recognition by filing its representation petition, or by August 5, three days later, the Union attained the support of a majority of Respondent's employees in the following unit of permanent and temporary employees, a unit which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees employed by Cardinal Home Products, Inc., at its Linesville, Pennsylvania, facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

The Unit includes certain employees whom Cardinal Home Products, Inc., calls "temporary."

As of those dates, and between those dates, Respondent employed 65 employees; and 33 is a majority. I count the cards of Simmerman, Larson, McGill, Thomas, Slee, Weikal, Wheeler, Alderman, Dyne, O'Neil, Bill Richards, David Brown, and Russell Crate, who authenticated their own cards. The parties stipulated to the authenticity of the card of Regis Kardos. I also count the cards of the following employees: Albert Abbott, Don Abrams, Allen, Black, Theodore Bolharsky, Richard Chizmar, Bob Claypoole, Cramer, Raymond Ellis, Scott Felix, Bill Free, George Freeman, Stacy Gillette, Grogan, Tim Hunter, Daniel Isenberg, James Jenkins, Kephart, George Lucas, Chuck McCusker, Richard Messeral, Arthur Miller, Thomas Mirabito, Terry Motter, Alan Moyer, Peterson, Rick Richards, Robert Watts, and Alan Zoner. All the cards were signed on July 31, except the cards of Chizmer, Crate, Dyne, Jenkins, and Zoner, 5 which were signed on August 1 and the card of Isenberg, which was signed on August 3. Thus, as of July 31, 37 employees had signed cards for the Union, and as of August 5, 43 had signed cards, a clear majority of the 65 employees. The important date here, for the purposes of a Section 8(a)(5) violation, is August 2, because then the Union demanded representation. *Q-1 Motor Exp.*, 308 NLRB 1267, 1269 fn. 10 (1992), enf. 25 F.3d 473 (7th Cir. 1994), cert. denied 513 U.S. 1080 (1995).

In so finding, I discredit as false and the result of leading questions Cramer's testimony that the cards were intended solely to ask the Union to talk to the employees. I do not find the testimony of Allen, who also signed the anti-Union petition, accurate, either. In any event, he never told Kardos or Cotterman that the sole purpose of the cards was to get an election or that the unambiguous language of the cards should be disregarded. I reject Respondent's contention that all of Simmerman's testimony should be rejected. No doubt, he changed his testimony from the first to the second day regarding employees who either signed in his presence or personally delivered their cards to him. While it is understandable that he may have forgotten who did what (others did also), it is less than understandable for him to sign an affidavit and then testify to certain facts on one day and change his testimony on the next. That indicates that he does not take too seriously the oath that he has taken.

On the other hand, the difference in his testimony about the cards, as well as others, has little legal effect; because the fact that an employee returned his card to the authenticating witness is sufficient to authenticate the card. *Don the Beachcomber*, 163 NLRB 275, 275 fn. 2 (1967), enf. denied on other grounds 390 F.2d 344 (9th Cir. 1968). Indeed, two of the card signers, as to whom one of the General Counsel's witnesses wavered, were called by Respondent and never denied that they either signed their cards in the presence of the authenticating witness or delivered them to him. In addition, Respondent undoubtedly had a sufficient number of sample signatures of each of the employees in its personnel files to question the validity of any of the cards and did not do so. It also had access to all the

employees to subpoena them to testify and did not do so. In these circumstances, I find Simmerman's testimony probable, even in the alternative, and credit it.

Having found that the Union represented a majority of the employees, I turn to the question of the need for a bargaining order. The Board wrote in *Canter State Beef & Veal Co.*, 330 NLRB 41, 43 (1999), enfd. in part 227 F.3d 817 (7th Cir. 2000):

Under *Gissel*, the Board will issue a bargaining order, absent an election, in two categories of cases. The first category involves "exceptional cases" marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless have a tendency to undermine majority strength and impede the election processes." In this second category of cases, "the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and . . . employee sentiments once expressed [by authorization] cards would, on balance, be better protected by a bargaining order." [*Gissel*, 395 U.S.] at 613-615.

I have found that Respondent failed to recall Larson, a leading Union supporter, and Banks and discharged McGill. The latter two were supporters of the Union, but less active than Larson. At least with respect to her, that is a "hallmark violation" of the Act, an unfair labor practice that is highly coercive and has a lasting effect on election conditions, *NLRB v. Jamaica Towing*, 632 F.2d 208, 212-213 (2d Cir. 1980). Noll, Respondent's principal officer, seems to have aimed his attention at a longtime employee, McGill, who was subjected to at least several interrogations by Gagen. Noll, dissatisfied by her Union support, changed her job so she would be deprived of a vote, unlawfully interrogated her about how she was going to vote, and still was dissatisfied even when she finally agreed to vote against the Union and challenged her ballot. Then, three weeks later, without any actual change of conditions, Respondent fired her. In her case and those of Larson and Banks, "the seriousness of the conduct, coupled with the fact that often it represents complete action as distinguished from mere statements, interrogations or promises, justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the work force." *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 213 (1980). The employees, both permanents and temporaries, surely will learn from these events that, if they support the Union, they jeopardize their jobs.

Added to these unlawful activities, Respondent threatened that it would not recall Larson because of her testimony in a Board proceeding and Thomas because of his union activities, promoted five employees before the election, interrogated other employees before and after election, assigned Bill Richards to a more onerous job and told him that it did so because of his union activities, disciplined Simmerman with an oral warning because of his testimony before the Board as well as his union activities, threatened Simmerman with unspecified reprisals for filing unfair labor practice charges, adopted and maintained unlawful no solicitation – no distribution rules before and after the election. Those violations, in *Gissel's* second category, are sufficient to warrant the grant of a bargaining order. They destroyed any chance for a fair rerun election.

In recommending a bargaining order, I reject a number of Respondent's contentions. First, Respondent recognizes that I am bound by the Board's holding that the bargaining unit including temporary employees is appropriate, but raises this issue to preserve it for further review. I can do nothing. Second, there was ample dissemination of the unfair labor practices,

including Union supporters, temporary employees, who changed their minds about the Union after they were promoted to permanent employees. Third, regarding the fluctuating number of temporary employees, the majority of the employees were permanent and remained fairly stable. To the extent that there was some turnover, the Board does not consider turnover. *Overnite Transportation Company*, 329 NLRB 990, 994 (1999).

Having concluded that the appropriate relief shall include a bargaining order and that Respondent had the duty to bargain with the Union as early as August 2, I find that Respondent never gave the Union prior notice or an opportunity to bargain over the following: the August 8 layoff of Banks, David Brown, Grogan, Hunter, Larson, Lucas, Ray Melvin, O'Neil, Phillips, Thomas, and Watts; the grant of wage increases to Miller on about August 7, to Hunter on about September 7, and to Weikal on about October 16; the recall of various employees from layoff on August 21 and September 21; the November 1 rule barring solicitation and distribution that applied only to temporary employees; the September 22 change of Bill Richards' work schedule; the promotion of Bilich, Clark, Miller, Peterson, and Weikal to permanent employees; and the October 6 change of McGill's employment status from an hourly to a salaried employee. I conclude that Respondent, in violation of Section 8(a)(5) and (1) of the Act, unlawfully refused to bargain with the Union and unilaterally changed those terms and conditions of employment, about which the Union had the statutory right to bargain.

The Objections to the Election

The critical period here extended from August 2, the date of the filing of the petition, through the October 13 election date. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). On March 27, the Union filed timely objections, which, with one exception, complain about the same conduct alleged in the complaint. The objections were consolidated into this proceeding by Order of the Regional Director, dated April 6, 2001.¹⁷ I have found nothing in the record, including the exhaustive brief filed by the Union, that relates to Objection 23, surveillance by Davis. I therefore dismiss it. I also dismiss Objections 3, 5, 7, 12, 13, 15, 20, 21, and 22 for the reasons expressed above. Objection 18 was dismissed during the hearing. I also dismiss Objections 6 and 8 on the ground that Respondent did not refuse to recall Larson during the pre-election period. I have found the following unfair labor practices which occurred between the filing of the representation petition and the election and which constitute objectionable conduct as alleged in Objections 1, 4, 10, 11, 16, and 19. Despite my findings of objectionable conduct, because I have recommended that a bargaining order issue, I recommend that the election be set aside, that Case 1-RC-15542 be dismissed, and that all proceedings in connection therewith be vacated. *Trading Port*, 219 NLRB 298 (1975).

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because Respondent discriminatorily discharged McGill, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis, from the date of her discharge, and backpay liability shall continue to run to the date of Respondent's proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, McGill shall be

¹⁷ During the hearing, the Union withdrew objections 2, 9, 13 (as it related to Black), 14, and 17.

reimbursed for any loss of earnings that she may have suffered by reason of Respondent's change of her status from an hourly to a salaried employee, with interest as computed above.

The normal remedy for Respondent's refusal to recall Larson and Banks is very similar: Respondent must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates when it is determined in compliance proceedings that positions were available to them to be recalled, and backpay liability shall continue to run to the date of Respondent's proper offer of reinstatement, less any net interim earnings, in the manner set forth above. In the case of Larson, the date that backpay should commence for the Section 8(a)(3) violation shall be no later than November 28, 2000, when the stain booth reopened. However, I have also found that Respondent violated Section 8(a)(5) by making a number of unilateral changes. For those unilateral changes, which include the August 8, 2000 layoff of Larson and Banks and others, Respondent shall be ordered to rescind them, on request of the Union, and to make any employee adversely affected whole for any loss of earnings and other benefits, in the manner set forth above, with interest. The record does not demonstrate that Larson and Banks would have necessarily been selected for layoff, had there been bargaining with the Union. *Hedison Mfg. Co.*, 249 NLRB 791, 794 (1980), *enfd.* 643 F.2d 32 (1st Cir. 1981). Finally, I shall also order Respondent to expunge the oral warning to Simmerman, which Keil retained in his files.

On the foregoing findings of fact and conclusions of law and on the entire record,¹⁸ including the briefs and reply briefs submitted by all parties, I issue the following recommended¹⁹

ORDER

Respondent Cardinal Home Products, Inc., Linesville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing its employees that its employee, Sam Thomas, would not be recalled from layoff because he supported the United Steelworkers of America, AFL-CIO, CLC (Union).

(b) Threatening its employees with disciplinary action because they supported the Union or gave testimony at a Board representation hearing.

(c) Interrogating its employees about their Union activities and sympathies and involvement in a Board investigation.

(d) Threatening its employees with unspecified reprisals because of their involvement in a Board investigation.

¹⁸ The joint motion of all parties to correct the transcript, dated November 6, 2001, is granted and received in evidence as G.C. Exh. 158. The unopposed joint motion of the General Counsel and the Union motion to correct the transcript, dated November 6, 2001, is granted and received in evidence as G.C. Exh. 159.

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Threatening to assign its employees with more onerous job assignments, because its employees supported the Union.

(f) Maintaining and promulgating overly broad rules that prohibit its employees from engaging in union solicitation and unauthorized distribution of literature in working and nonworking areas on nonworking time.

(g) Promoting its employees from temporary to permanent employees in order to discourage them from supporting the Union.

(h) Changing the employment status of its employees from hourly to salaried employees in order to discourage them from supporting the Union.

(i) Failing and refusing to recall its employees from layoff, because its employees formed, joined, and assisted the Union and engaged in Union activities and to discourage its employees from engaging in these activities.

(j) Failing and refusing to recall its employees from layoff, because its employees appeared or testified at a representation hearing before the Board.

(k) Discharging its employees, because its employees formed, joined, and assisted the Union and engaged in Union activities and to discourage its employees from engaging in these activities.

(l) Assigning its employees to more onerous job assignments, because its employees formed, joined, and assisted the Union and engaged in Union activities and to discourage its employees from engaging in these activities.

(m) Promulgating a work rule applicable to its temporary employees, changing the work schedules of its employees, promoting its employees from temporary to permanent status, changing the employment status of its employees from hourly to salaried employees, laying off its employees, granting wage increases to its employees, and recalling various of its employees from layoff without affording the Union adequate prior notice and opportunity to bargain with respect to this conduct and the effects of this conduct.

(n) Refusing to bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit set forth below.

(o) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of its employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production and maintenance employees employed by Cardinal Home Products, Inc., at its Linesville, Pennsylvania, facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

The Unit includes certain employees whom Cardinal Home Products, Inc., calls "temporary."

(b) Within 14 days from the date of this Order, offer Christine Larson and Ernest Banks full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Within 14 days from the date of this Order, offer Bonnie McGill full reinstatement to the job she held before Respondent unlawfully changed her status from an hourly employee to a salaried employee, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Christine Larson, Ernest Banks, and Bonnie McGill, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this Decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to its unlawful failure to recall Christine Larson and Ernest Banks, its unlawful discharge of Bonnie McGill, and its unlawful discipline issued to Howard Simmerman, and within 3 days thereafter notify the employees in writing that this has been done and that its failure to recall, its discharge, and its discipline, respectively, will not be used against them in any way.

(f) On request, rescind all unilateral actions found to have been effected in violation of its collective-bargaining obligations and make whole any of its employees adversely affected by those unilateral actions for any loss of earnings or other benefits suffered as a result, in the manner set forth in the Remedy section of this Decision.

(g) Rescind its unlawful no distribution – no solicitation rules.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Linesville, Pennsylvania facility copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy

²⁰ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

of the notice to all current employees and former employees employed by the Respondent at any time since August 2, 2000.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held in Case 6-RC-11868 is set aside and that the representation petition in that case be dismissed.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 1, 2002

Benjamin Schlesinger
Administrative Law Judge